United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1273

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES ex rel. SEBASTIAN ROSSILLI,

Relator-Appellant,

- against -

J. E. LaVALLEE, WARDEN,

Respondent-Appellee,

- X

Docket No. 74-1273

APPENDIX TO APPELLANT'S BRIEF

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70C 399 UNITED STATES OF AMERICA, ex rel. SEBASTIAN ROSSILLI vs. HON. J. E. LaVALLEE, WARDEN, ETC.

DATE	FILINGS-PROCEEDINGS	
3/30/70	PETITION FILED FOR A WRIT OF HABEAS CORPUS. Letter of the relator filed dated March 20, 1970.	1 & 2
4/21/70	By ZAVATT, J. MEMORANDUM AND ORDER FILED. The Clerk is directed to mail a copy of this memorandum-order to the petitioner, a copy thereof and a copy of the order to show cause to the Attorney-General of New York, and a copy of the order to show cause to the respondent. (See Order.)	3
4/21/70	By ZAVATT, J. ORDER TO SHOW CAUSE FILED. 1) The Attorney General of the State of New York, as attorney for the Respondent, show cause before this Court by the filing of a return to the petition, why a writ of habeas corpus should not be issued; 2) Within ten (10) days of receipt of this order, the Attorney General of the State of New York shall serve a copy of his return on the petitioner herein and file the original thereof, with proof of such service, with the Clerk of this Court; etc. (See Order.)	4
4/21/70	Copy of letter of Clerk of the Court, dated April 21, 1970, addressed to Sebastian Rossilli enclosing copy of order to show cause, dated April 21, 1970, filed.	5
4/21/70	Copy of letter of Clerk of the Court, dated April 21, 1970, addressed to Sebastian Rossilli enclosing copy of Memo and Order by ZAVATT, J., dated April 21, 1970, filed.	6
5/11/70	Affidavit of HILLEL HOFFMAN, Assistant Atty., Gen., State of N.Y., filed in opposition.	7

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70C 399 UNITED STATES OF AMERICA, ex rel. SEBASTIAN ROSSILLI vs. HON. J. E. LaVALLEE, WARDEN, ETC.

DATE	FILINGS-PROCEEDINGS	
5/25/70	Letter of relator herein filed dated May 21, 1970 addressed to U.S. Court, together with Affidavit of said relator, SEBASTIAN ROSSILLI in reply and affidavit of service by mail.	8-9-10
6/17/70	BY ZAVATT, J. MEMORANDUM filed. PETITION DENIED. The Clerk is directed to mail a copy of this memorandum-order to the petitioner, addressed as follows: Sebastian Rossilli #41689 Clinton Prison, Box B., Dannemora, N.Y. 12929; and to the Atty., Gen., State of N.Y., etc. THIS IS AN ORDER. (See Memo and ORDER)	11
6/17/70	Copy of letter of Clerk of Court filed dated June 17, 1970 addressed to Mr. Sebastian Rossilli re enclosure of a copy of memorandum and order of the Hon. JOSEPH C. ZAVATT, filed herein on June 17, 1970.	12
7/2/70	Letter of Sebastian Rosselli filed dated June 29, 1970 re his Notice of Appeal, etc., NOTICE OF APPEAL FILED.	13 & 14
7/2/70	Letter of Clerk of Court filed dated July 2, 1970 addressed to Mr. Sebastian Rossilli advising him that the Notice of Appeal was received by the Clerk's Office.	15
7/21/70	All papers together with a certified copy of docket entries constituting the record on appeal were this day mailed to the Clerk, USCA.	
7/23/70	Copy of index filed with the acknowledgement endorsed thereon by the Clerk, U.S.C.A., re receipt of same.	16
9/24/70	Application filed for a Certificate of Probable Cause, together with letter of relator filed dated September 15, 1970 addressed to the Court, etc.	17 & 18
10/14/70	BY ZAVATT, J. MEMORANDUM FILED. THE PETITION IS DENIED. (See Memo) The Clerk is directed to mail a copy of this memo, etc., to petitioner. THIS IS AN ORDER (See Memo)	19

70C 399 UNITED STATES OF AMERICA, ex rel. SEBASTIAN ROSSILLI vs. HON. J. E. LaVALLEE, WARDEN, ETC.

DATE	FILINGS-PROCEEDINGS	
10/15/70	Copy of letter of Clerk of Court filed dated Oct. 15, 1970 addressed to Mr. Sebastian Rossilli re enclosure of a copy of memo, etc.	20
10/16/70	Papers Numbered 17-18-19-20 constituting a SUPPLEMENTAL INDEX TO RECORD on APPEAL were on this day mailed to Clerk, U.S.C.A.	
10/21/70	Copy of Index filed returned to this office with acknowledgement thereon re receipt of papers, etc.	21
8/17/71	Certified copy of order filed. (U.S.C.A.). In accordance with a suggestion by petitioner's counsel, the case is REMANDED to the District Court with instructions to await the outcome of the present appeal in the Appellate Division, and with leave to move in the District Court to introduce the newly discovered evidence.	22
12/13/71	All documents in this matter were on this day returned to this office, from the Clerk, U.S.C.A. - Receipt signed and mailed to said court.	
6/4/73	Notice of Motion filed for an order granting petitioner leave to introduce newly-discovered evidence, and granting petitioner a writ of habeas corpus, etc. (returnable June 18, 1973 at 10:00 A.M.	23
6/4/73	MEMORANDUM FILED IN SUPPORT OF MOTION.	24
6/11/73	Copy of letter BY ZAVATT, J., filed dated June 6, 1973 together with a copy of letter by FRANCIS E. KOCH, re reassignment of case, etc.	25 & 26
7/6/73	Before MISHLER, CH. J. - Case called and adj'd to 7/20/73.	27
7/19/73	Affidavit of Hillel Hoffman, Assistant Atty., Gen., State of N.Y. filed in opposition, etc.	
7/20/73	Before MISHLER, CH. J. Case called. Motion argued. DECISION RESERVED.	

70C 399 UNITED STATES OF AMERICA, ex rel. SEBASTIAN ROSSILLI vs. HON. J. E. LaVALLEE, WARDEN, ETC.

DATE	FILINGS-PROCEEDINGS	
7/20/73	Reply affirmation of FRANCIS E. KOCH, ESQ., filed.	28
11/30/73	BY MISHLER, CH. J. Memorandum and Decision and Order filed. THE PETITION is DISMISSED and it is SO ORDERED. The Clerk of Court is directed to enter judgment in favor of the respondent and against petitioner dismissing the petition. See Memo., etc.	29
12/3/73	BY THE CLERK: JUDGMENT FILED, ORDERED and ADJUDGED that judgment is entered in favor of the respondent and against the petitioner and the Petition is DISMISSED.	30
12/26/73	NOTICE OF APPEAL FILED (from order of Nov. 30, 1973) together with a copy of order of U.S.C.A. appointing FRANCIS E. KOCH, ESQ. to represent relator herein.	31 & 32
12/26/73	Copy of Notice of Appeal was on this day mailed to Hon. Louis J. Lefkowitz, etc.	
12/26/73	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A.	
12/26/73	Instructions on preparation of record, etc. were on this day handed personally to a representative of the office of FRANCIS E. KOCH, ESQ.	
1/30/74	All documents in this matter together with a certified copy of docket entries were on this day transmitted to Clerk, U.S.C.A.	

Rec'd by mail
Dec. 3, 1973

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA ex rel.
SEBASTIAN ROSSILLI,

Petitioner,

-against-

HON. J. E. LaVALLEE, Warden,

Respondent.

- - - - - - - - - - - - - - - - - - -

70 C 399

Memorandum of Decision
and Order

November 30, 1973

On January 19, 1967, after a three day trial before a jury in the Nassau County Court, petitioner was convicted of robbery in the first degree and of five counts of assault in the second degree. On March 22, 1967, he was sentenced to varying terms to run concurrently, the longest of which was 18 to 30 years (as a second felony offender on the robbery count).

The offenses arose out of an armed robbery of a home at 239 Bay Boulevard, Atlantic Beach, Nassau County, at about 11:15 A. M. on January 11, 1965. One of the robbers gained entrance to the home by posing as a uniformed delivery man with a package for the owner, Mrs. Sydelle Marcus. Two others followed. Both Mrs. Marcus and her maid, Mary Barsh,

were assaulted. Fortuitously, Mr. William Brown rang the front doorbell while the robbery was in progress. One of the robbers, later identified by Brown as petitioner, held a gun to his head. Meanwhile, Mrs. Barsh freed herself (she had been bound with adhesive tape) and ran out of the house. The three robbers pursued her down Bay Boulevard. In the pursuit, they ran by three boys (Brian Barto, age 16 years; John Swift, age 15 years; and William Henderson, age 17 years) who were offering their services to homeowners for clearing the sidewalks of snow.

A felony (probable cause) hearing at which petitioner was present with counsel was held on February 5, 1965, as required by § 190 of the New York Code of Criminal Procedure.[1] At the hearing, Brown identified petitioner as the robber who held a gun to his head. He was "absolutely sure" of petitioner's identity. Brown was vigorously cross-examined by petitioner's counsel. (See Brown's testimony appended to this memorandum.)

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[1] Section 190 of the Code of Criminal Procedure, now §§ 180.10(2) and 180.60 of the New York Criminal Procedure Law, provides in part that:

> The magistrate, immediately after the appearance of counsel or after the defendant has waived counsel ...must proceed to examine the case, unless the defendant waives examination....

The District Attorney's office caused subpoenas to be served on Brown, requiring his appearance on May 21, 1965, and September 13, 1965, the dates on which the trial had been scheduled. He was served at his place of employment, a garage located at 700 Park Avenue, New York City. The case was again scheduled for trial on July 6, 1966, and a subpoena issued for Brown's appearance on that date. The District Attorney learned that Brown had terminated his employment and had left no address. An attempt to serve Brown at his last known home address at 835 Trinity Avenue, Bronx, New York, was fruitless.

The District Attorney's office requested that Detective Carmen Altomare locate Brown. He called Brown's employer, Mr. Minskoff, at the garage at 700 Park Avenue and was advised by Mr. Minskoff's secretary that Brown had left his employment and that his whereabouts was not known. He telephoned the residence at Trinity Avenue and was told that Brown did not live there anymore. Detective Altomare checked the records of the Board of Elections and the telephone directory, without success.

At the trial, the People advised the court that it intended to offer into evidence Brown's testimony given at

the probable cause hearing of February 5, 1965. The court then held a due diligence hearing in accordance with Section 8 of the Code of Criminal Procedure.[12] Detective Altomare testified that while the hearing was in progress he had visited 835 Trinity Avenue with Detective Koehler and had interviewed a Mrs. Louise Brown in Apartment 43. She told the detectives that her husband was William Brown, that he had left her in October, 1965, and that she had not seen him since.

Detective Edward F. Koehler testified that in October and December, 1966, he made inquiry of the utility companies and postal authorities in an effort to locate Brown. The

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[12] Section 8 of the Code of Criminal Procedure, now Section 670.10 of the Criminal Procedure Law, provides in part that:

> In a criminal action the defendant is entitled . . .
> 3. To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that (a) where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of a defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine the witness, the deposition of the witness may be read in evidence by either party upon its being satisfactorily shown to the court that the witness is unable to attend by reason of his death, insanity, sickness or infirmity, or that the witness cannot with due diligence be found in the state . . . .

investigation led to a Mary Brown (unrelated) who advised Detective Koehler that she knew Brown but had not seen him for about three months.

Walter Voolens, a process server attached to the District Attorney's office, testified that he attempted to find Brown at 835 Trinity Avenue on September 6, 1966. He inquired of the superintendent and the mailman. Neither knew William Brown.

Petitioner offered no evidence of efforts to locate Brown.

Swift and Barto testified at the trial. They identified petitioner as one of the three men who ran by them on January 11, 1965, at about 11:30 A. M., as they walked on Bay Boulevard. Henderson was unable to identify petitioner. Petitioner's wife and mother-in-law testified that petitioner was at home at 165 Mott Street in Manhattan at the time of the robbery. Mr. Brown's pre-trial testimony was read at the trial.

Petitioner's conviction was affirmed on July 1, 1968, 30 A.D. 2d 815, 293 N.Y.S.2d 702 (2d Dept.), and leave to appeal to the New York Court of Appeals was denied. The United States Supreme Court denied the petition for a writ

of certiorari on October 13, 1969, 396 U.S. 865, 90 S.Ct. 142 (1969).

On March 20, 1970, petitioner filed an application for a writ of habeas corpus. The petition was denied in a memorandum of decision by United States District Judge Joseph C. Zavatt on June 17, 1970. On October 14, 1970, Judge Zavatt denied petitioner's application for a certificate of probable cause. On April 15, 1971, Circuit Judge Wilfred Feinberg granted the certificate of probable cause and subsequently, appointed Francis F. Koch as attorney for petitioner. On May 12, 1971, before the appeal was perfected, petitioner filed an application in the nature of a writ of error coram nobis in the Nassau County Court, which was denied on May 18, 1971, without a hearing. Petitioner appealed the denial of the writ to the Appellate Division of the Supreme Court, Second Judicial Department. The Circuit Court of Appeals, by order dated August 2, 1971, permitted the petitioner to withdraw his appeal from the denial of his federal habeas corpus petition and remanded the case "to the District Court with instructions to await the outcome of the present appeal in the Appellate Division, and with leave to move in the District Court to introduce

the newly discovered evidence." The Appellate Division affirmed the denial of the coram nobis writ, 38 A.D.2d 894 (2d Dept. 1972), and leave to appeal to the New York Court of Appeals was denied on April 17, 1972. Petitioner, by motion dated May 31, 1973, and filed June 4, 1973, moved to introduce newly discovered evidence.

Petitioner's supporting papers include affidavits by William Brown, sworn to February 22, 1971, and Mary Brown, his wife, sworn to April 15, 1972, which were submitted to the Nassau County Judge in the coram nobis proceeding. Their affidavits attest to Brown's presence in West Palm Beach, Florida, in January, 1967, and attempt to rebut the testimony given in the due diligence hearing that Brown's absence was the result of a marital rift as suggested in Detective Altomare's testimony. Significantly, Mary Brown's affidavit concedes that she "was contacted by a Nassau County Detective while my husband was in Florida" (in January, 1972). Petitioner's affidavit concludes that since Brown was in West Palm Beach at the time of trial, he was not missing. He requests a hearing "to determine whether what originally might have seemed due diligence was actually due diligence." (Affirmation, Francis F. Koch.)

A hearing is required where petitioner "alleges facts which, if proved, would entitle him to relief . . . ." unless "the state-court trier of fact has after a full hearing reliably found the relevant facts." Townsend v. Sain, 372 U.S. 293, 312, 83 S.Ct. 745, 757 (1963). This court finds first, that the evidence which petitioner seeks to introduce is not "newly discovered" and second, that the finding of due diligence in the state court must be accorded great weight, 28 U.S.C. § 2254(d); LaValle v. Rose, 410 U.S. 690, 93 S.Ct. 1203 (1973), and in this case is determinative of the issue of due diligence. Accordingly, an evidentiary hearing is not required.

The "newly discovered evidence" which the petitioner seeks to introduce at an evidentiary hearing is proof of Brown's residence in West Palm Beach, Florida, at the time of the trial. (Petitioner's Brief, pp. 1-2; Petitioner's Attorney's Reply Affirmation.) This evidence, however, is not newly discovered since petitioner had the opportunity to discover it when Brown's address in the Bronx was revealed at the due diligence hearing on January 17, 1967.

Petitioner's claim of being denied this evidence through lack of funds is specious. A subway ride to Brown's residence in the Bronx would have given him everything he

learned in Mary Brown's affidavit of April 15, 1972, and everything he knows now.

As a general rule, a writ of habeas corpus is not available to review erroneous evidentiary rulings in the state court trial.[3] Smith v. Hand, 305 F.2d 373 (10 Cir.

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[3] Mr. Justice Powell, in a concurring opinion in Schneckcloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973), discussed the limitations on the availability of habeas corpus with respect to claims of fourth amendment violations. The opinion carefully traces the use of the writ in reviewing state court judgments from the passage of the Habeas Corpus Act of 1867 first authorizing its use in that area to the present. In deprecating the recent expanded use of the writ to challenge state judgments of conviction on every constitutional ground, he observed that:

> Recent decisions, however, have tended to depreciate the importance of the finality of prior judgments in criminal cases. [citations omitted] This trend may be a justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. But the justification for disregarding the historical scope and function of the writ is measurably less apparent in the typical Fourth Amendment claim asserted on a collateral attack. In this latter case, a convicted defendant is most often asking society to redetermine a matter with no bearing at all on the basic justice of his incarceration.

412 U.S. at 256, 93 S.Ct. at 2062-63.

1962). Petitioner cites Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318 (1968), as authority for granting the writ in the event that the hearing showed lack of due diligence in locating Brown. In Barber, the court held that the failure of the state to make any effort to bring in a federal prisoner where, as a matter of federal policy and statutory rule[14] the state had the power to produce the witness, violated the petitioner's sixth amendment right to be confronted with witnesses against him.[15] The test applied by the Supreme Court in determining the unavailability of a witness was whether "the prosecutorial authorities have made a good-faith effort to obtain his presence at the trial."[16]

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[14] 28 U.S.C. § 2241(c)(5) (1970).

[15] The court in Barber described the right of confrontation as being "basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." 390 U.S. at 725, 88 S.Ct. at 1322.

[16] See also Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308 (1972) (testimony of the witness at a previous trial admissible where the state made "a good faith effort to obtain the presence of the witness"); California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970)(testimony given at a preliminary hearing admitted at the trial "so long as declarant's inability to give live testimony is in no way the fault of the state.")

390 U.S. at 725, 88 S.Ct. at 1322. The crucial facts in Barber were that the state "made absolutely no effort to obtain the presence of Woods [the witness] at trial" and that there existed at least two alternative means of securing the witness's presence. Id. at 723-24, 1321-22.

Petitioner's contention of lack of due diligence is based on the fact that Brown was in fact alive and well in West Palm Beach, Florida, at the time of the trial. The test, however, is not whether Brown was actually residing at an ascertainable location, but whether the state, acting in good faith, made a reasonable effort to find Brown and to produce him at the trial.[7] The reasonableness of the state's effort must be determined in light of the facts as they existed at the time of the trial, not in light of subsequent events. Speculation on what other means might have revealed Brown's whereabouts is likewise fruitless. See United States ex rel. Oliver v. Rundle, 298 F.Supp. 392, 395 (E.D. Pa. 1969), aff'd, 417 F.2d 305 (3d Cir. 1969), cert. denied, 397 U.S. 1050, 90 S.Ct. 1388 (1970). Proof that Brown lived in West Palm Beach does not show lack of due diligence. The

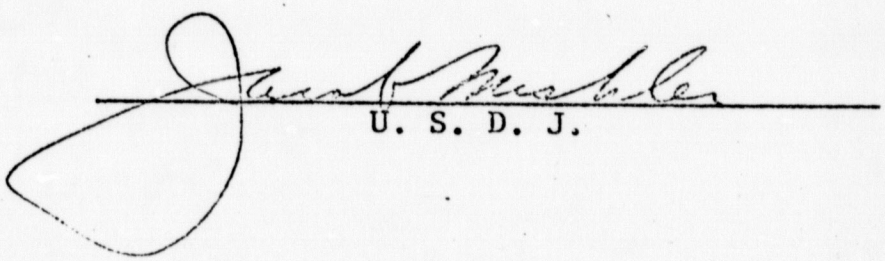
[7] Mary Brown's statement of the interview with the police officer reinforces, rather than detracts from, the good faith and due diligence finding made by the state trial judge.

test is whether the People acted reasonably and in good faith. The People met the test here.

The petition is dismissed and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of the respondent and against petitioner dismissing the petition.



U. S. D. J.

TESTIMONY OF WILLIAM BROWN GIVEN AT FELONY HEARING ON FEBRUARY 5, 1965

W I L L I A M B R O W N, of 700 Park Avenue, New York City, New York, having been sworn, testified as a witness for the People herein, as follows:

DIRECT EXAMINATION BY MR. LAURIE:

Q Mr. Brown, what is your occupation?

THE COURT: Before we start, there will be a short recess.

(Whereupon, there was a short recess.)

(Whereupon, after a short recess, the Examination was continued.)

Q Mr. Brown, what is your occupation?

A Chauffeur.

Q By whom are you employed?

A Mr. Marion [Myron] Minskoff.

Q And on January the 11th, 1965, where were the Minskoffs living at that time?

A They have their house in Atlantic Beach which is why it was sold, that day we come over to clean it out for the new tenant.

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Q And this new house of the Minskoffs, where is it located in relation to the house of Mrs. Marcus?

A Right in front of Mrs. Marcus.

Q You mean, across the way when you say in front?

A Yes, right directly in front.

Q And did you have occasion on January 11, 1965 at about 11:15 a.m. to visit the house of Mrs. Marcus?

A Yes, sir.

Q Would you please tell the Court under what circumstances you visited that house?

A Well, January 11, about ten o'clock we left New York City to go to Atlantic Beach to clean out the house for the new tenants that bought the house. We got there around eleven o'clock. Mrs. Minskoff went right over to Mrs. Marcus to have coffee. She stayed about five minutes. She come back and she told me that I could go over to Mrs. Marcus and get a pot of coffee that she had on the stove for the help.

So, at the time, I was drinking instant coffee that I had made but I had a terrible headache, so I figured, well, being she said I could go over there, I could go over and get some asprins. So I walked over and

knocked on the door and the maid comes to the door - - -

Q Do you know the maid's name, Mr. Brown?

A Her name is Mary, I only know her name at that time.

Q By Mary?

A Yes.

Q All right.

A So Mary comes to the door and she seems that water was running out of her eyes. So I said, told her, would you please give me a couple of asprins, I have a headache. So Mary turns around and she shuts the door and goes back and she stays so long until I ring the bell again, I didn't get any answer. I ring again. I didn't get any answer. So I just took my hand and I banged on the door. So Mary come back the second time and she opened the door and she didn't say anything, she just opened the door and busted right out in front of me and ran and some fellow ran right out behind her trying to catch her. She fell in the snow about three times, but she got away from this fellow and she ran next door to some people's house and right after that the second fellow came out.

Q Did this man have anything in his hand?

A He had a gun in his hand.

Q He had a gun in his hand?

A Yes, he did.

Q Are you sure that he had a gun?

A Yes, yes, I am sure.

Q How close were you to this man?

A The one that came behind Mary?

Q That's right, the first one.

A Very close, he ran right by me trying to catch her.

Q In which hand was he holding the gun?

A His right hand.

Q All right, continue.

A And the second man came out with a gun in his hand and he held it in my face and he says, don't move. So I says, "Detective, I just want to come over to get some aspirins." I thought it was detectives. I said, "I only come over to get some aspirins." He just held the gun there, "Don't move." So the third man come out and he shot at Mary twice.

Q Where was Mary at that time?

A She was making it to this woman's garage, she was running in the garage.

Q Well, is the garage across the way or alongside?

A Their garage - - both houses was on the same side that she ran into.

Q I see. Go ahead.

A And the third man, he shot twice and he beat it and he told his partners, he said, "Let's get out of here," and that's when they left me standing there.

Q All right. And that man that was holding the gun to your face, is he here in Court today?

A Yes, he is.

Q Would you please point him out?

A That's the man there (indicating).

Q You are actually sure that that is the man?

A I am absolutely sure.

MR. LAURIE: Your Honor, I request that the man pointed out be identified - - that is, to identify himself.

THE COURT: All right. Will you please rise?

And will you please identify yourself?

MR. ROSSILLI: Sebastian J. Rossilli.

THE COURT: Thank you. You may be seated.

Q You're absolutely sure that was the man?

A I am sure that's the man.

Q What happened after that, after they left?

A Well, I run across to my boss. He was on the phone calling his office, Mr. Marion [Myron] Minskoff, and I told him, I says, "Some people just come out with guns." I said, "They held up the house over there." I said, "Call the police."

So, he didn't call the police. He went right over and he went into the house and he told me to stay in his house and he went over to this house and he told me when he got there that he went upstairs and found Mrs. Minskoff tied up and then he called the police from her house.

Q You mean Mrs. Marcus?

A I mean Mrs. Marcus tied up, and he called the cops from her house.

MR. LAURIE: No further questions.

CROSS EXAMINATION BY MR. GERMAISE:

Q Mr. Brown, you saw all three of these men?

A I saw all three.

Q Now, the first man that came out, was he the one who ran after the maid, Mary?

A That's the first man.

Q What was he wearing?

A I didn't pay any attention to what he was wearing because I thought they was detectives. I didn't pay that much attention. I was afraid.

Q Were you afraid of detectives?

A Why not?

Q Did you do anything wrong?

A No.

Q Have you ever been convicted of a crime, Mr. Brown?

A No.

Q What were you afraid of?

A I'm always afraid of the law.

Q The second man, Mr. Brown, the man who put the pistol in your face.

A Yes.

Q What was he wearing?

A What was he wearing? He was wearing a sport jacket, a sport shirt, and he was wearing a trench coat that had reversible colors in it.

Q I don't know what you mean by that, sir, I am sorry.

A Well, it's just these trench coats that you can wear. When you get in the light with them, they are a different color, it makes a different color.

Q What color was it?

A Well, it was more of a orange color in the light.

Q An orange color?

A Well, I would say.

Q What color was his sport shirt?

A His sport shirt was yellow.

Q And the sport jacket?

A Sport jacket; he had on a regular sport jacket.

Q What color?

A That I didn't pay any attention to but a sport jacket.

Q Well, was it a solid color or was it a plaid?

A This was a solid color.

Q A solid color?

A Yes.

Q Was he wearing a hat?

A Yes, he was.

Q What did his face look like?

A What did his face look like? Like his face looks now.

Q Will you describe it? Look at me and tell me what his face looked like.

A I can't tell you how his face looked. I am looking at him.

Q Was he clean-shaven.

A. Yes, he was clean-shaven.

Q Did he wear glasses?

A No.

Q How tall would you say the fellow was?

A Oh, five - - five-six something.

Q Did he say anything to you, Mr. Brown?

A He said, "Don't move."

Q How did he speak?

A "Don't move."

Q Did he say anything else to you?

A No.

Q What kind of a gun did he have?

A He had a black revolver.

Q Black revolver?

A Yes, blue steel. I would say it was dark.

Q The gun was dark?

A Yes, it was a dark gun.

Q And now, the third man that came out, Mr. Brown, did you see him?

A Not his face, I didn't get a look in his face.

Q What was he wearing, Mr. Brown?

A They all had on trench coats.

Q The three of them?

A The three of them.

Q Were they all the same kind of trench coats?

A No.

Q Well, the first one, what kind of a trench coat did he wear?

A The first one I didn't get a good look to know what kind of a trench coat he was wearing. The only trench coat that I got a good look at was the one that held me prisoner for a few minutes.

Q Was the first trench coat a dark trench coat or a light trench coat?

A That I didn't pay any attention, I was scared. All I know it was a trench coat.

Q Was the first man wearing a hat?

A All three were wearing hats.

Q All three were wearing hats?

A All three were wearing hats.

Q What kind of hats?

A Just hats.

Q Now, sir, you're talking - - I show you a hat. Is this the kind of a hat that they were wearing? This is, I believe, they call a fedora, your Honor?

THE COURT: Yes.

Q A fedora, was this the kind of hat they were wearing, fedoras?

A I only got a good look at the one that held the gun with me.

Q What kind of a hat was he wearing?

A This was a brown hat.

Q This style of a hat?

A It's a very short brim.

Q Short brim?

A Short brim.

Q But was it a fedora hat?

A Not like that, no.

Q Would you describe it, please?

A I can't describe it.

Q Well, was it a beret?

A No, it was a hat.

Q It wasn't a cap?

A It was a hat.

Q It was a hat?

A It was a hat hat.

Q Now, will you explain - - will you describe the hat, please?

A It was a brown hat.

THE COURT: What he wants to know is, was it a fedora style?

A Not like that.

THE COURT: But it was - - but was it that style?

A No, not like that. It was a hat with the, you know, no split down the center, it was round in the center, it weren't split down the center, like a pancake.

Q You're talking about if you take the pinches out of this hat?

A That's right, and make it round on the top.

Q A porkpie hat?

A Yes.

Q Now, the other two men, what were they wearing? What kind of hats?

A I didn't pay any close attention to the hats, but I knew they had hats.

Q They all had on hats and they all had on trench coats?

A That's right.

Q Now, Mr. Brown, did you describe any of these men to the police?

A Did I describe any of them to the police? I couldn't describe, only the one that I saw his face.

Q And how did you describe him?

A Hos [sic] did I describe him? I said he was a neat-cut fellow.

Q Neat-cut fellow?

A Very neat-cut.

Q What does that mean, Mr. Brown?

A Well, he was a well-dressed - - he was very clean.

Q Does that mean clean-shaven?

A Yes, he was clean-shaven.

Q What else did you describe about him?

A That's all in his face.

Q Were you shown pictures of anyone?

A Yes, I saw a lot of pictures.

Q And who showed you these pictures?

A I didn't see any pictures of him.

Q You didn't see any pictures of him?

A No.

Q When was the first time you saw the defendant after that incident on the stoop?

A February 1st.

Q Where was that, Mr. Brown?

A Over in Brooklyn in the hallway of the coat [sic] building.

Q What were you doing there, sir?

A I was picked up by the detective.

Q Yes?

A To come over to this coat [sic] house, they said they had picked up a fellow in Brooklyn on a robbery and

he wanted to see did I know the fellow.

So on the way going to the coat [sic] house I saw this fellow in the hallway of the coat [sic] house so I said to the detective, I said, "There is the fellow (indicating)".

Q That was last Monday?

A That's right.

Q Was the fellow pointed out to you as the fellow?

A No, he was not.

Q You picked him out in the hall?

A I did.

Q And didyou see him after that?

A Did I see the fellow after that?

Q Yes.

A I didn't see him no more from that day up until this day.

Q Did he look the same to you on February 1st, was he dressed the same way as he was the day you spoke of when he pointed the gun at you?

A No, he was not.

Q He was not?

A No, not to me, he wasn't.

Q Well, was his face the same? Was it still smoothly shaven?

A His face was the same.

Q Smoothly shaven face?

A Yes.

MR. GERMAISE: No further questions.

MR. LAURIE: No further questions.

The People rest, Your Honor.

MR. GERMAISE: At this time the Defendant moves to dismiss, your Honor, on the grounds the People have failed to make out a prima facie case.

THE COURT: First I have to inform the Defendant.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA ex rel. SEBASTIAN ROSSILLI,

Petitioner,

- against -

HON. J. E. LAVALLEE, WARDEN,

Respondent.

- -X

Docket No. 70-C-399 JCZ

NOTICE OF MOTION TO INTRODUCE NEWLY-DISCOVERED EVIDENCE

S I R :

PLEASE TAKE NOTICE that, upon the annexed affidavit of Sebastian Rossilli, sworn to March 26, 1973, the annexed affidavit of Marie Rossilli sworn to May 16, 1973, the affirmed statement of Francis E. Koch dated May 29, 1973, and upon the notice of motion for a writ of habeas corpus dated March 20, 1970, the petition of Sebastian Rossilli, verified March 20, 1973, heretofore filed with the Court, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court (Zavatt, J.), at 900 Ellison St., Westbury, L.I. 11590, on June 18, 1973, at 10:00 a.m., for an order, pursuant to 28 U.S.C.§2254 and Fed.R.Civ.P.60(b), granting petitioner leave to introduce newly-discovered evidence, and granting petitioner a writ of habeas corpus in accordance with the notice of motion dated March 20, 1970, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York

May 31 , 1973.

Francis E. Koch

Francis E. Koch
Attorney for Petitioner
40 Wall Street
New York, New York 10005
WH 4-0960

TO: HONORABLE LOUIS J. LEFKOWITZ
Attorney General of the State of New York
80 Centre Street
New York, New York 10013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA, ex rel. SEBASTIAN ROSSILLI,

Petitioner,

- against -

HON. J. E. LAVALLEE, WARDEN,

Respondent.

- -X

Docket No. 70-C-399

SUPPORTING AFFIDAVIT

STATE OF NEW YORK)
: ss:.
COUNTY OF ULSTER)

SERASTIAN ROSSILLI, being duly sworn, says:

I am the petitioner herein and submit this affidavit in support of a motion to introduce newly discovered evidence. Leave to submit this motion was granted by the Court of Appeals for the Second Circuit on a prior appeal in this case by its decision dated August 2, 1971, referred to more fully hereafter.

I. Preliminary

As my petition for a writ of habeas corpus verified March 20, 1970, showed, I was, and I am still, confined in a prison of the State of New York by reason of a judgment of a court of the State of New York which I contend violated my federal constitutional rights. After I had exhausted all my remedies under state law, I applied to this Court for a writ of habeas corpus. This Court, by Judge Zavatt, denied the writ. I thereupon applied to the Court of Appeals for the Second Circuit for leave to appeal in forma pauperis. That Court granted me leave

and assigned me counsel to prosecute my appeal.

While the appeal was pending, and before it had been argued, an investigation which my family had caused to be made resulted in the discovery of evidence, to be discussed more fully below, which, I am advised by counsel, constitutes newly-discovered evidence. This evidence was submitted to the court in which I had been convicted, the County Court of Nassau County, which denied me relief. An appeal was taken to the Appellate Division of the Supreme Court.

My counsel on the appeal in the Court of Appeals called the Court's attention to these developments, and that Court (Waterman, Smith, and Kaufman, C.JJ.) on August 2, 1971, disposed of my appeal as follows:

> "In accordance with a suggestion of petitioner's counsel, the case is remanded to the District Court with instructions to await the outcome of the present appeal in the Appellate Division, and with leave to move in the District Court to introduce the newly discovered evidence."

A copy of the Court's order is attached hereto as Exhibit A.

Thereafter the Appellate Division affirmed the decision of the County Court of Nassau County, and a judge of the Court of Appeals of the State of New York denied me leave to appeal to that Court. Further proceedings were had, to be discussed below, but their outcome was unfavorable to me. My state remedies having been exhausted, I now apply to this Court.

II. The Identification by the Missing Witness

My trial in County Court, Nassau County, turned on a question of identification: was I one of the men who had committed a robbery at a private house? A couple of boys who were shoveling snow nearby when the robbers ran past identified me as one

of them, but their testimony was hesitant and uncertain. I submitted alibi evidence. The undoubtedly convincing evidence was that of William Brown, who had come to the door of the hous while the robbery was in progress and who had seen the robbers run out. He identified me as one of them.

His identification, however, was not made at the trial. It was made at a preliminary hearing and was not subject to cro examination. At the trial the prosecution did not present him as a witness and claimed that he could not be found. The Court conducted a hearing and ruled that the prosecution had used due diligence in trying to locate him; so it permitted the transcrip of his testimony at the preliminary hearing to be read in eviden against me. There was testimony suggesting that Mr. Brown was evading the service of a subpoena and that he had fled the juris diction, perhaps because of marital troubles.

The jury convicted me, and the conviction was affirmed. After exhausting my state remedies, I applied to this Court for a writ of habeas corpus. The crucial question on my application was whether the prosecution had used due diligence in attempting to locate the missing witness. After considering the evidence, this Court ruled against me.

III. The Missing Witness Had Never Been Missing

My family did not have enough money to finance the investigations necessary to uphold my defense. Eventually, though, they were able to obtain the services of an investigator, Mr. Hyman Rosenblatt, who was able to find Mr. Brown at his home address in the Bronx, and to obtain from him an affidavit, a copy of which is attached hereto as Exhibit B.

The substance of the affidavit is that he was living at

...d that his wife, with whom he had been
...l trouble, knew of his whereabouts, but
...e had ever been contacted by the prosecu-
...f having him testify at my trial.
...ffidavit, I submit, raises the most serious
...rosecution had used due diligence in
...im and thus whether his testimony should
...jury on my trial.
...e Coram Nobis Proceedings and Appeals
...r. Brown's affidavit to the County Court,
...oram nobis proceeding. That Court summarily
...without hearing the testimony of Mr.
...Court's decision is attached as Exhibit C.
...that the Court's refusal to conduct a
...rown would testify constituted error and
...ken together with the other evidence, cast
...the prosecution had used due diligence.
...y Court could not properly rule that Mr.
...ncredible on its face.
...to the Appellate Division of the
...being handled by the Legal Aid Society
...Court affirmed the order of the County
...App.Div.2d 893 (2d Dep't 1972), and a
...eals denied leave to appeal to that
...llate Division's order is attached as
...tificate denying leave to appeal to the
...t E.

I am informed that during the course of the application before a judge of the Court of Appeals, a question was raised about the advisability of obtaining evidence from Mrs. Brown. Accordingly, an affidavit was obtained from Mrs. Brown, which corroborated her husband's affidavit, and which made it even more doubtful whether the prosecution had used due diligence in attempting to locate him. A copy of her affidavit is attached as Exhibit F.

A renewed application was made to the County Court, Nassau County, which as summarily rejected Mrs. Brown's affidavit as it had rejected Mr. Brown's affidavit. A copy of the Court's decision is attached as Exhibit G. The Legal Aid Society of Nassau County applied for leave to appeal, in accordance with an intervening change in New York law, but a justice of the Appellate Division of the Supreme Court denied leave to appeal. A copy of the decision is attached as Exhibit H. On September 20, 1972 the judge of the Court of Appeals who had denied me leave to appeal adhered to his original decision. A copy of his letter is attached as Exhibit I.

I submit that the refusal of the state courts to consider the affidavits of Mr. and Mrs. Brown in connection with the question whether the prosecution had used due diligence in seeking to produce Mr. Brown as a witness deprived me of due process of law. There was no basis for the state courts to reject the affidavits of Mr. and Mrs. Brown out of hand as inherently incredible; nor was the evidence against me so strong that a court could say that my conviction would have to be upheld even if the transcript of Mr. Brown's testimony at the preliminary hearing

were to be disregarded. Indeed, the weakness of the other identification evidence is such that it is most likely that, without the admission on the trial of the transcript of Mr. Brown's testimony at the preliminary hearing, I would not have been convicted.

Conclusion

It is respectfully submitted that the motion should be granted and that the affidavits of William and Mary Brown should be introduced and a hearing held thereon.

S/SEBASTIAN ROSSILLI
Sebastian Rossilli

Sworn to before me this
26TH day of March, 1973

S/LOUIS G. STAMATEDES
Notary Public
[NOTARIAL STAMP]

IN THE MATTER OF :

PEOPLE VS SEBASTIAN ROSSELLI

* *

STATE OF NEW YORK)
: SS. :
COUNTY OF NEW YORK)

I, WILLIAM BROWN, hereby affirm the following in relation to the above entitled case:

I am presently living together with my wife, Mary Brown, at 835 Trinity Avenue, Bronx, New York, on the Fourth Floor. We have lived at this address for the past seven (7) years.

On January 17, 1967, my wife, Mary Brown, resided at the aforesaid address on the Fourth Floor. At that time I had been employed by Arthur Cole, and in conjunction with my employment I resided on Lincoln Avenue, West Palm Beach, Florida. I was in constant communication with my wife, Mary Brown, and she knew where I was employed and the address I resided at, in Florida. My wife and I were always amiable and our marital relationship was good. We never quarrelled to the point where we were separated. When I was in Florida I was never contacted by the authorities of Nassau County in relation to the above entitled case. I never left ths New York area for the purpose of evading the issuance of a subpoena. I never changed my name nor did I ever tell my wife not to reveal my whereabouts. My wife always knew of my whereabouts and she could have readily contacted me if there was a need to do so. In my communications with my wife she never informed me that the authorites from Nassau County were looking for me.

On two previous occasions prior to January 17, 1967, detective from Nassau County visited my apartment and I accompanied them to court.

I make the foregoing statement of my free will and avow that the contents herein are true.

WILLIAM BROWN

SWORN TO BEFORE ME THIS 22ND DAY OF FEBRUARY, 1971
JOHN J. TODD NOTARY PUBLIC, STATE OF NEW YORK NO. 30-3994850 qualified in Nassau County Term Expires March 30, 1971.

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A41
EXHIBIT B

A12 EXHIBIT C

COUNTY COURT — NASSAU COUNTY
SPECIAL TERM: PART I

Present:
Hon. DOUGLAS F. YOUNG
County Judge

Motion Cal. # 2-332
Indictment # 20001

PEOPLE OF THE STATE OF NEW YORK

—against—

SEBASTIAN ROSSILLI,

Defendant

HON. WILLIAM CAHN
District Attorney
Nassau County
Mineola, New York

SEBASTIAN ROSSILLI
Defendant, Pro Se
Attica State Prison
Attica, New York

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause	
Supporting Affidavits	
Answering Affidavits	
Reply Affidavits	
Affidavits/Exhibits	
Filed Papers	

Briefs: People's Petitioner's ____ Defendant's Respondent's ____

The foregoing papers numbered 1 to ____ having been read on this motion ____

Application by defendant, SEBASTIAN ROSSILLI, pro se, in the

nature of a writ of error coram nobis.

Defendant was convicted after trial of the crimes of Robbery in the First Degree, Burglary in the Second Degree, Grand Larceny in the First Degree and five counts of Assault in the Second Degree. The judgment was affirmed on appeal (People v. Rossilli, 30 A.D. 2d 815). Leave to appeal to the Court of Appeals was denied, and a petition for a writ of certiorari was denied (385 U.S. 865).

In this application defendant again attacks the propriety of the use on the trial of the testimony of a witness (William Brown) given at pre-trial felony hearing. This matter was fully litigated at the trial, and was one of the points covered on appeal. Defendant now submits an

A42
EXHIBIT C

42

affidavit by said William Brown indicating his availability to testify at the trial.

It would serve no purpose to characterize the affidavit of William Brown. However, "due process does not require a court to accept every sworn allegation as true" (People v. White, 309 N.Y. 230).

In People v. Howard, 12 N.Y. 2d 65, it is stated at page 66:

> "There is . . . an unmistakable social value in putting an end to litigation at some point and there is, as well, an unmistakable social burden in affording unending corrective process for any defect".

and at page 68 it is said:

> ". . . neither coram nobis nor any other post-conviction remedy may be employed to perform the office of an appeal".

Motion denied in all respects.

SO ORDERED.

GRANTED

ENTER

DATED: May 19th, 1971

HAROLD W. McCONNELL
CLERK

DOUGLAS F. YOUNG
J.C.C.

PLEASE TAKE NOTICE THAT: The petitioner be and is hereby advised of his right to appeal from this determination and upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, petitioner may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. (Rule V, Appellate Division, Supreme Court, Second Department).

DOUGLAS F. YOUNG
J.C.C.

ENTERED

MAY 21 1970

HAROLD W. McCONNELL
CLERK OF NASSAU COUNTY

A43a

APPENDIX B

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent : AFFADAVIT

-against- :

SEBASTIAN ROSSILLI :

Defendant-Appellant

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MARY BROWN, being duly sworn, deposes and says:

I am presently living together with my husband, WILLIAM BROWN, at 835 Trinity Avenue, Bronx, New York on the Fourth Floor. We have lived at this address for the past eight (8) years.

In January, 1967 my husband, WILLIAM BROWN, was temporarily in Florida due to his employment. I knew my husband Florida address and communicated with him constantly during his stay. My husband and I have always been amiable and our marital relationship was always good. We never separated because of a quarrel.

I could always contact my husband if I wanted to do so. William never told me not to reveal his whereabouts.

I was contacted by a Nassau County Detective while my husband was in Florida. I informed the Detective that William was temporarily in Florida due to his employment responsibilities.

Confusion as to my husband's whereabouts may have resulted from that fact that a Mr. and Mrs. William Brown live in Apartment 43 on the Fourth Floor of building No. 837 Trinity Avenue, Bronx, New York which is physically connected to 835 Trinity Avenue, Bronx, New York.

I make the foregoing statement of my free will and avow that the contents herein are true.

Sworn to before me this
15 day of April, 1972

Mary Brown

Notary Public

LEONARD H. RODAU
Notary Public, State of New York
No. [illegible]
Qualified in Nassau County
Commission Expires March 30, 1973

LEONARD H. RODAU
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in Nassau County

A44a
EXHIBIT F

CO. A.45

SPECIAL TERM: PART I; II

Present:

Hon. DOUGLAS M. YOUNG
County Judge

Motion Cal. # MS-1325
Indictment # 20091

PEOPLE OF THE STATE OF NEW YORK

—against—

SEBASTIAN ROSSILLI,

Defendant

HON. WILLIAM CAHN
District Attorney
Nassau County
Mineola, New York

JAMES J. McDONOUGH, ESQ.
Attorney for Defendant
Legal Aid Society of
Nassau County, N.Y.
Criminal Division
Nassau County Court House
Mineola, New York

RECEIVED
JUL 28 1972
LEGAL AID SOCIETY
CRIMINAL DIVISION

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause	
Supporting Affidavits	
Answering Affidavits	
Reply Affidavits	
Affidavits/Exhibits	
Filed Papers	

Briefs: People's Petitioner's _____ Defendant's Respondent's _____

The foregoing papers numbered 1 to _____ having been read on this motion _____

This is an application for a Writ of Error Coram Nobis. The issue concerns the use at the trial of testimony of William Brown, given at a preliminary hearing, identifying the petitioner as a culprit. The prior testimony was received after a hearing in which the People contended that, despite the exercise of due diligence, William Brown could not be found. The case has a history in both the New York appellate courts and the federal courts. The Appellate Division, Second Department affirmed the judgment of conviction (30 A.D. 2d 815). Leave to appeal to the Court of Appeals was denied and appellant's petition for certiorari was denied by the United State Supreme Court (396 U.S. 865). Defendant's petition for a writ of habeas corpus was dismissed by the Honorable Joseph C. Zavatt, U.S. District Judge (Eastern District of New York) on

EXHIBIT G
A45a

June 17, 1970.

A prior application in Coram Nobis was made, pro se, on April 19, 1971. The application, which was supported by an affidavit of William Brown, was denied without a hearing on May 18, 1971 by the Nassau County Court. The Appellate Division unanimously affirmed the denial of the prior application on February 28, 1972.

Application was made to Associate Judge Adrian P. Burke for leave to appeal to the Court of Appeals from the adverse determination on the Coram Nobis application. Leave was denied by order dated April 17, 1972. Thereupon this application was made, returnable June 9, 1972, and supported by an additional affidavit executed by Mary Brown, the wife of William Brown.

The petitioner is represented by the Legal Aid Society of Nassau County. In this application petitioner's attorney states that at an oral hearing in the chambers of Judge Burke (concerning the application for leave to appeal) the petitioner's counsel and the assistant district attorney of Nassau County orally agreed that if an affidavit could be obtained from Mary Brown a hearing should be held to determine if the petitioner's rights had been violated. Judge Burke denied the application for leave to appeal to the Court of Appeals without opinion. This Court does not consider itself bound by a stipulation between the attorneys, if such stipulation was entered into. I believe that the two attorneys concerned would agree with this position. There is no indication that the denial by Judge Burke of petitioner's application for leave to appeal was in any way based upon discussions concerning the furnishing of an affidavit by the said Mary Brown.

The question of whether the Nassau County Court decided correctly that the People had proved that they used due diligence in attempting to locate the missing witness, William Brown, has thus been determined and

that determination affirmed, both on appeal from the judgment and on appeal from the denial of a Coram Nobis hearing.

However on the strength of the affidavit of Mary Brown the petitioner argues (on the third page of the supporting affidavit of Victor M. Ort executed May 25, 1972) that the use of prior testimony of William Brown (given at a preliminary hearing) at the trial violated the defendant's Sixth Amendment rights if Brown was not in fact unavailable. I believe this to be an over-simplification. If this were the inflexible rule the witness whose prior testimony is offered could make himself unavailable at the time of the trial and resurface after the trial. The defendant could then claim that the witness could have been available if the searchers had only looked in the right places.

Rather I believe that the issue of whether the search for the missing witness was conducted in good faith and with due diligence must be determined at the time of the trial. U.S. ex rel. Oliver v. Sunde, 289 F. Supp. 332; affd. 417 F. 2d 303; cert.den. 90 S.Ct. 1338, reh.den. 90 S.Ct. 2255; Gov't of Virgin Islands v. Aquino, 378 F. 2d 540. If a thorough search was conducted and all reasonable avenues were explored and this is demonstrated in a hearing where both sides can be heard then the determination should not be disturbed later because someone has an afterthought about another place or person that might have been investigated. See cases collected in "Words and Phrases, Vol. 13A, "Due Diligence" at p. 148, 159 ALR 1240; 45 ALR 2d 1354.

A denial of relief can be justified only if it does not effect a denial of fair treatment and basic justice. There is no such denial involved here. A review of the record will demonstrate that the court conducted a thorough and intensive hearing upon the availability of Willina Brown. It does not counter common experience to appreciate that a search in a neighborhood predominantly occupied by black persons

for a man with a common name like William Brown is likely to be frustrating. Admittedly the person sought was then out of the state and there were other persons with the same or similar names in the area. The People are required to show that they have conducted a thorough search in good faith and with due diligence. Having done so the prior testimony is admissible and the issue is settled. If there were charges of perjury or other misconduct, reopening the issue might be justified. The facts here do not warrant such relief.

The recent appellate division decisions demonstrate that prior testimony has been utilized on showings of considerably less diligence than was shown in this case.

In People v. Lombardi, A.D. 2d , 332 N.Y.S. 2d 749, the testimony of a victim at a prior trial was read and the absence of the witness was excused on the basis of testimony of the victim's husband and of her psychiatrist that it would be dangerous to her health to testify again.

In People v. Malcolm, 35 A.D. 2d 1037, 315 N.Y.S. 2d 966, the testimony of a witness at a preliminary hearing was read into the record because the witness had moved to Virginia and was attending dental school and his schedule did not permit him to attend.

In the opinion on the prior Coram Nobis application I referred to the desirability of having some finality in judgment. People v. Howard, 12 N.Y. 2d 65. This is a consideration of fundamental importance. In the absence of a charge of perjury or conduct which shocks the conscience the question should be regarded as closed. When the prior Coram Nobis application was submitted in 1971 an affidavit of William Brown formed the basis. Now petitioner come in with an affidavit of Mary Brown (William Brown's wife) and advances this as a reason for granting the new hearing. Presumably that affidavit could have been obtained by petitioner

in 1971, as its contents indicate. Petitioner gives no reason why it was not or could not have been obtained and submitted at the time of his prior Coram Nobis application.

This is a situation to which Section 440.10 3(c) of the Criminal Procedure Law is applicable. That subparagraph provides that the court may deny an application to vacate a motion if: "Upon a previous motion made pursuant to this Section the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so."

As the defendant has not shown that he could not have included an affidavit of Mary Amen to support his prior Coram Nobis application the court exercises the discretion afforded it by the statute to deny the relief sought.

I go back for guidance also to former practice rulings, and the situation which arose under the former Code of Criminal Procedure in applications to set aside a judgment on the ground of newly discovered evidence. For example, when a prosecution witness would offer to recant, such changes of heart were viewed with suspicion but, in any event, whatever the alleged new evidence might be, the petitioner was required to show that it would be likely to change the outcome. There is no indication that if a retrial were ordered and William Brown were called he would change his testimony in any way nor that the outcome of the trial would be affected. It seems reasonable to apply this rule, particularly where five years have elapsed between the conviction and the new application.

The application is denied in all respects.

So ordered.

J.

DATED: July 31st, 1972

A49a

County was responsible for his conviction, and he kept urging that William Brown be located. But without money, there was nothing we could do.

I have been working for the last four years, and was gradually able to save money with which to hire an investigator. Toward the end of 1970 or the beginning of 1971, my brother-in-law located an investigator, Mr. William Rosenberg, and I retained him to look for William Brown. In a week or so I was informed that he had located William Brown, who was at the address where he was supposed to be. I was also informed that William Brown was reluctant to get involved in the case in any way, so that it was not until February 22, 1971 that William Brown could be persuaded to give an affidavit.

On the basis of this affidavit, my husband, represented by the Legal Aid Society of Nassau County, started a coram nobis proceeding in May 1971 in the court where he had been convicted. Relief was denied there, and on appeal. At some place in the appellate procedure, it was contended that an affidavit from William Brown's wife should be obtained; accordingly, an affidavit was obtained from Mrs. Brown in April 1972.

I firmly believe in my husband's innocence of the crime for which he was convicted in Nassau County. He was home with me at the time the crime was committed, and I so testified on his trial. It is painful to me that, because of lack of money, it was not possible at an earlier date to retain the services of an investigator, especially when the investigator was able, in such a short time, to locate the man whom, I am informed, four men from the Nasaau County prosecutor's office were not able to locate.

S/MARIE ROSSILLI
Marie Rossilli

Sworn to before me this
16TH day of May, 1973.
S/RALPH MASTANDREA
[NOTARIAL STAMP]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA ex rel. SEBASTIAN ROSSILLI,

Petitioner,

- against -

HON. J. E. LAVALLEE, WARDEN,

Respondent.

- -X

Docket No. 70-C-399

SUPPORTING AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARIE ROSSILLI, being duly sworn, says:

I am the wife of relator Sebastian Rossilli, and I make this affidavit in support of my husband's motion to introduce newly-discovered evidence.

In January 1967 my husband was convicted of the crime for which he is now imprisoned. The crime was committed in January 1965 in Nassau County. My husband was arrested for another crime committed in Brooklyn in January 1965, pleaded guilty to that charge, and was committed to prison in November 1965, where he has since remained, first under sentence for the crime in Brooklyn, and then under sentence for the conviction in Nassau County. In January 1967 our son (who is now 15 years old) and I were welfare recipients.

My husband firmly believed that the testimony of William Brown which was read to the jury in his trial in Nassau

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel
SEBASTION ROSSILLI,

Petitioner,

-against-

J. EDWIN LA VALLEE, Superintendent
of Clinton Correctional Facility,

Respondent.

----------X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

HILLEL HOFFMAN, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for respondent. I submit this affidavit in opposition to petitioner's application for leave to introduce newly discovered evidence and for a writ of habeas corpus.

Petitioner was convicted by the Nassau County Court on March 22, 1967, and sentenced as a second felony offender to 18 to 30 years for robbery in the first degree, 10 to 20 years for grand larceny in the first degree, and 5 to 10 years for five counts of assault, all sentences to run concurrently.

Petitioner's conviction was affirmed by the Appellate Division, Second Department on July 1, 1968 (30 A D 2d 815), and leave to appeal was subsequently denied by the New York Court of Appeals. On October 13, 1969 the United States Supreme Court denied certiorari.

Petitioner then applied to this Court for a writ of habeas corpus, which was denied by District Judge Zavatt on June 17, 1970. Petitioner then applied for a certificate of probable cause and the assignment of counsel in the Court of Appeals, and this motion was granted by Judge Feinberg on April 21, 1971. Subsequently, before the appeal was perfected, petitioner was given permission to withdraw the appeal and to return to the District Court after the outcome of a coram nobis proceeding in the state courts based on newly discovered evidence.

This application for coram nobis was denied by the Nassau County Court on May 18, 1971, and the Appellate Division unanimously affirmed this decision without opinion in February, 1972. On April 17, 1972 Judge Burke denied petitioner's application for leave to appeal to the New York Court of Appeals.

The gravamen of petitioner's current application is that his newly discovered evidence will demonstrate that the Nassau County prosecutor failed to use due diligence to locate a missing witness whose prior recorded testimony was read into the record at petitioner's trial. This witness - one William Brown - had testified at a preliminary hearing in petitioner's case, but could not be located for the trial itself. Petitioner contends, on the basis of affidavits executed by Brown and his wife, that Brown was available and should have been called as a witness and subjected to cross-examination.

Respondent respectfully submits that petitioner's current application should be dismissed, both on the facts and on the law. A careful examination of the testimony and evidence will reveal that petitioner has not demonstrated that the prosecution failed to exercise due diligence in locating the missing witness in his case.

At the outset it will be instructive to reiterate the testimony concerning the efforts of the prosecutor to locate William Brown. At a pretrial hearing on due diligence, Leonard Fabian, a process server employed by the Nassau County District Attorney, testified that the initial address he had for the missing witness was 700 Park Avenue, New York City (minutes 6,15). He said that Brown was actually served with subpoenas returnable on May 21, 1965 and September 13, 1965 at the Park Avenue address, but the case did not go to trial on those dates (7,8,15).

Fabian stated that a subpoena was once again issued for Brown returnable on July 6, 1966 at the Park Avenue address (a garage where Brown worked), but that Brown was no longer employed there, and the garage personnel were unable to give any other address for him (8). Fabian stated that telephone calls and additional subpoenas were of no avail (9).

Eventually an address for Brown was obtained at Trinity Avenue, Bronx, New York, and an attempt was made to subpoena him there, but to no avail (9). The Post Office was asked for a forwarding address but no information was forthcomming (10).

In all, five subpoenas were issued for Brown and many telephone calls were made by the prosecutor's office (10). Fabian had two telephone numbers for Brown at the Park Avenue address, and made several telephone calls to those numbers, that presumably were unsuccessful (14,41).

In addition, a Phyllis Collins had indicated to the process server on January 17, 1966 that she had not seen Brown for over a year (43). Also, the official records indicated that

Brown had left his place of employment at 700 Park Avenue, New York City, on or about January 2, 1966, which apparently was learned by Process Server Walter Voolens when he sought to serve a subpoena upon Brown in June, 1966 at the Park Avenue address (45-50).

Detective Carman Altomare of the Nassau County Police Department testified that the District Attorney requested his assistance in locating Brown in October or November, 1966 (15-16). Prior to that time Altomare had known Brown (Altomare was in charge of the Rossilli case), and was in possession of the New York City and Bronx addresses for Brown (16). Altomare contacted Brown's employer and was informed by a secretary that Brown no longer worked there (16-17). Altomare also called the Bronx telephone number and was informed by someone that Brown was not there any more and there was no forwarding address for him (17). Altomare also checked the Board of Elections and the telephone directory without success (17,18).

Altomare further testified that during the due diligence hearing he paid a visit to Brown's residence in the Bronx, accompanied by a Detective Koehler (75). Altomare spoke with the superintendent of the building, and a Mrs. Brown, who informed him that her husband had not lived with her since October, 1965 as a result of marital problems (76). She also told the officers that she had been receiving phone calls from the Police Department and the District Attorney's office trying to locate her husband, and that she told them that she had not seen him for a long time (76).

Detective Koehler testified that he knew Brown and had made efforts to locate him in late October or early November, 1966 (20). He said that he contacted the telephone company business office and asked if they had a telephone number for Brown, and was informed there was no number for Brown at the Bronx address (20-21). Koehler also contacted, without success, the Con Edison company, the local letter carrier and a supervisor at the Post Office (21). The postal employees checked their records for one year prior to Koehler's request and knew of no William Brown, nor did they have a forwarding address for him (21).

Koehler discovered from the Postal Department, however, that there were several William Browns at the Bronx address, and in response to a phone call made by him to a William Brown at that address, he was advised by a Mary Brown that she had not seen William Brown for about three months (21-22). Mary Brown was not a relative of William Brown but she said that she knew him (22). Koehler admitted that his efforts to contact Brown were made from Nassau County, with the exception of a stop he made at the Postal Department in New York City (23).

Walter Voolens, a process server, testified that he had previously served William Brown during 1965 and that he tried to serve Brown in 1966 (56). Voolens first went to the 700 Park Avenue garage in New York City, where he had previously served Brown on two prior occasions (56, 61-62). When he arrived at the garage Voolens was told that Brown had left his job about the first of the year (56).

Subsequently, Voolens received information from the detectives that he might find Brown at the Trinity Avenue address (56-57). Voolens attempted to serve another subpoena

upon Brown in September, 1966 (57,73). He went to a multiple dwelling in the Bronx which housed about 30 families (57). He went to the basement of the building because there was no indication on the mail boxes of the building of the names of the tenants (58).

Voolens spoke with the custodian or superintendent of the building, who told him that he had never heard of William Brown, and that there was more than one family in each apartment (58). Voolens started ringing doorbells on the first two floors, but he received no cooperation from the tenants (58).

Voolens waited outside the building and spoke with the mailman (59). He asked the mailman whether he had heard of a William Brown, and when he explained to the mailman what the situation was, the mailman told him that he could not recall any William Brown or any mail for him (59). The mailman did not let Voolens look in the mail boxes (59).

Voolens went to the next building on the street and spoke to the superintendent about William Brown, but the superintendent did not know a William Brown (59). Voolens said that no one in the neighborhood had heard of Brown (60).

Reviewing this evidence it is apparent that the District Attorney's office made diligent and good faith efforts to locate the missing witness. A process server went to the witness' place of employment and last known residence, two detectives went to the employer and the last known residence, numerous inquiries were made at the telephone company, the Con Edison company and the post office, and personal discussions

were had with the postal authorities, the letter carrier, the building superintendent, a Mrs. Brown, and a Mary Brown. All of these efforts were fruitless, and not one of these sources had any information about Brown's whereabouts.

Faced with these efforts by the prosecutor's office to locate William Brown, respondent strongly disagrees with petitioner's assertion that the affidavits of Brown and his wife "cast the gravest doubt on whether due diligence had been used." (petitioner's brief, p. 12). Assuming that Brown had been in constant communication with his wife, as alleged in his affidavi (petitioner's Exhibit "B"), and assuming that he had been in a position to receive messages, subpoenas, mail and other communications, it seems incredible that neither the building superintendent, the post office department, the letter carrier, other tenants in the building, another Mrs. Brown, a Mary Brown and Brown's former employer had no idea of where Brown was locat Rather the conclusion is inescapable that Brown, possibly to avoid the vigors of testifying at a felony trial, had concealed his whereabouts and left no forwarding address.

In like manner, the affidavit of Mary Brown, executed five years after the disputed events, adds little weight to petitioner's case. First, the Mary Brown affidavit speaks of a period during January, 1967 in which William Brown was purportedly employed in Palm Beach, Florida. This would not explain why Brown could not be located in June, 1966 or in October or November, 1966, when the Nassau County authorities mad their first efforts to locate him. Secondly, as in the case of Brown's affidavit, it is incredible that if Mary Brown were in

touch with her husband and in a position to send messages to him, that this fact was not known to the letter carrier, the building superintendent, the post office department, other tenants in the building, and Brown's former employer. Thirdly, a Nassau County detective testified that he spoke on the telephone to a Mary Brown at the Trinity Avenue address, and was informed that she was not a relative of William Brown and had not seen him for three months. We submit that the detective's contemporaneous testimony on this matter, is entitled to greater weight than Mary Brown's assertion, five years later, that she informed a Nassau County detective that William Brown was in Florida due to his employment responsibilities (see petitioner's Exhibit "F").

Under these circumstances, it is apparent why the Nassau County Court refused to conduct any further proceedings in this case, and denied petitioner's application for coram nobis. This disposition was correct as a matter of law because the issue of due diligence must be resolved according to the good faith efforts of the prosecutor at the time of the trial, and not according to the efforts made by a private investigator, years later, when the witness has returned to the jurisdiction.

In Eastham v. Johnson, 338 F. Supp. 1278 (E.D. Mich. 1972), the court formulated the standard for judging the issue of due diligence; "The test to determine 'unavailability' is whether the prosecution can demonstrate a 'good faith effort' to obtain the presence of the witness at trial. . . The determination of 'good faith effort' by the prosecution is a factual question to be determined in the light of the circumstances in each case." (338 F. Supp. at 1280, 1281).

In Eastham the Court upheld the use of testimony of a witness who had moved from the jurisdiction of trial, without leaving any forwarding address. In language that is particularly relevant here the Court found:

> "To locate Miss Wilkins [the missing witness] for trial, Detective Martinez contacted her neighbors in the apartment building where she lived and learned that she had moved sometime prior to his visit. Further, he talked to the landlord who advised him that he had been looking for Miss Wilkins to collect past-due rent. The landlord said he did not know where she could be located. Her parents and her sisters did not know her whereabouts. Detective Martinez testified that he even checked with the [local] school system to determine if any of Miss Wilkins' children were registered in school.
>
> The court does not feel Detective Martinez could have done anything more that would have been meaningful. He reported that Miss Wilkins' sister did say she 'seemed to think' Miss Wilkins went to California. Without a specific city or community in California it would have been pointless to continue the search." (338 F. Supp. at 1281).

Similarly, in People v. Burton, 286 N.E. 2d 792 (Ill. Ct. App. 1972), the Court upheld the use of prior recorded testimony, where the prosecution made efforts to locate missing witnesses that were analogous to the efforts made in the instant case:

> "The question of what actions constitute reasonable diligence and a good faith effort to locate and secure the presence in court of a witness depends on the facts and circumstances of each particular case. . . In the instant case, we are of the opinion that the State has shown a good faith effort to locate [the missing witnesses]. An investigator contacted election officials and representatives of the Post Office, visited the witnesses' last known address, and conferred with persons at those addresses and in the community." (286 N.E. 2d at 796).

See also, United States ex rel. Oliver v. Rundle, 417 F. 2d 305 (3rd Cir. 1969).

In the instant case, petitioner's newly discovered evidence has shown that the missing witness was residing in Florida at the time of petitioner's trial. The further assertions by this witness and his wife that he could have been contacted at that time through his wife, are contradicted by the overwhelming evidence given by the Nassau County process servers and detectives, that no one in the witness' neighborhood or former place of employment knew of his whereabouts. The newly discovered evidence does not disprove in any way the good faith efforts made by Nassau County to locate William Brown.

Accordingly, the state courts properly denied petitioner's application for coram nobis, and this Court should dismiss his petition for habeas corpus.

WHEREFORE, petitioner's application should be denied in all respects.

s/ Hillel Hoffman
HILLEL HOFFMAN

Sworn to before me this
18th day of July, 1973

s/ Irving R Rollins
Assistant Attorney General
of the State of New York